(13)

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 799

ELIAS HACKNER, et al.,

Petitioners,

vs.

GUARANTY TRUST COMPANY OF NEW YORK and GEORGE WHITNEY, individually and as a member of the firm of J. P. MORGAN & CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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INDEX.

	PAGE
Petition for Writ of Certiorari	1-2
Statement of the Matter Involved	2-3
Questions Presented	3-4
Reasons for the Allowance of the Writ	4-5
Prayer for Relief	5
Brief in Support of Petition	6
The Jurisdiction to Grant the Writ	6
Opinion Below	6
Statement of the Case	6-8
Points Relied on for Reversal	8
Argument	9
Summary of Argument	9
I. Rule 23(a)(3) should be liberally construed as to enable parties lacking the jurisdictional amount to be joined as plaintiffs with one having the jurisdictional amount in order to avoid unnecessary expenses and litigation, and the court erred in not giving such a construction	9-12
II. All of the notes were secured by one trust deed. The action was by the noteholders as a class against the trustee for malfeasance and misfeasance which resulted in a loss common to all. The proceedings were therefore properly invoked under Rule 23(a)(1) and the court clearly erred in construing this suit as under class 23(a)(3)	12-14

PAGE

(a) A suit by noteholders against a Trustee of the note issue for misfeasance and malfeasance common to all noteholders is a suit within Rule 23(a)(1), and the Court erred in classifying this suit as a spurious class suit 15

(b) The decision in the instant case that no class suit may be maintained by several noteholders predicated on fraud on the theory that the fraud might have been separate to each noteholder when the contrary was alleged and confessed to be true by the motion to dismiss, is in conflict with the decisions of the Seventh and Third Circuits and with the latest decision of this court 15-18

III. The court clearly erred in excluding Grace W. York as a plaintiff on the ground that the merits of the case may show that her $6,000 claim will be reduced to $3,000 18-20

CASES CITED.

Commercial National Bank of Los Angeles v. Catron, 50 F. (2) 1023 15

Deckert v. Independence Shares Corporation, 85 Law ed. P. 171 17

Finance Corporation v. Keystone Credit Corporation, 50 F. (2) 872 (C. C. A. 4) 4, 10

First State Bank v. Chicago, et al., 63 F. (2) 585, 587 15

Fitchett, et al. v. Blows, 74 F. 47, C. C. A. 8 15

Independence Shares Corp. v. Deckert, 108 F. (2) 51 ..... 4, 17

PAGE

Jones v. St. Paul Fire Co., 108 F. (2) 123 ..... 9, 10

Moore v. Ill. R. R. Co., 24 F. Supp. 731 9

Railway Express Agency v. Jones, 106 F. 341 ..... 4, 17

Starwood v. Wishard, 134 F. 359, 961 11

CASES DISTINGUISHED.

Rich v. Lambert, 12 How. 347 10-11

Stewart v. Dunham, 115 U. S. 61 11

Gibson v. Shifeldt, 122 U. S. 27 11

Clark v. Paul Gray, Inc., 306 U. S. 590 11

RULES CITED.

Rule 15(a) 2

Rule 23(a)(1) 3, 8, 12

Rule 23(a)(3) 3, 5, 8, 9, 11, 12

OTHER AUTHORITIES.

Vol. 18, Hughs Federal Practice, p. 78 18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Elias Hackner, Lees Ballinger, Grace W. York and Eunice E. Eastman, plaintiffs in the suit against Guaranty Trust Company of New York, as Trustee, and George Whitney, individually and as a member of the firm of J. P. Morgan & Co., defendants therein, herewith apply for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its judgment of January 13, 1941, affirming the decision of the District Court as to the petitioners, Elias Hackner, Lees Ballinger, and

Grace W. York, and reversing it only as to petitioner Eunice E. Eastman, and denying a rehearing on January 31, 1941.

Statement of the Matter Involved.

The action was commenced by Elias Hackner, C. J. Bowman and Lees Ballinger, as holders of notes of an issue of $30,000,000 secured by a Trust Indenture to the respondent, Guaranty Trust Company of New York, and was brought by the plaintiffs in their own right and for the common benefit of all noteholders (R. 4-8). None of the original plaintiffs had the required jurisdictional amount separately but their aggregate amount was within the jurisdictional requirement. By amendment under 15(a) of the New Federal Rules C. J. Bowman was omitted as a plaintiff, and Grace W. York, as the owner of $6,000 in notes, and Eunice E. Eastman, as the owner of $10,000 in notes, were added as plaintiffs (R. 35-36). A motion to dismiss was filed by the respondents on the ground that this was not a true class suit and the separate notes could not be totalled for the jurisdictional amount and that the amendment bringing in two plaintiffs, each of whom had the required amount, could not cure the alleged jurisdictional defect in the original complaint (R. 37). The court dismissed the Amended Complaint (R. 39).

The United States Circuit Court of Appeals, by its decision rendered January 13, 1941, sustained the trial court in its position that the suit was not a true class suit and that the separate notes secured by the same Trust Indenture could not be aggregated for the jurisdictional amount. It concluded that only one plaintiff had the required jurisdictional amount and that it was improper to join the plaintiffs who lacked the jurisdictional amount with the plaintiff who had the required amount. For this reason it affirmed the trial court in

the dismissal of the action against three of the plaintiffs and reversed the trial court as to the plaintiff Eunice E. Eastman (R. 46).

A petition for rehearing was filed by these petitioners (R. 54) which pointed out to the court that Grace W. York had a claim of $6,000 and that she was improperly excluded as a plaintiff under the decision. The petition for rehearing also pointed out that even if this was not a true class suit it was proper to join claimants who lacked the jurisdictional amount with the claimant who had the required amount because the suit was predicated upon a common state of facts and points of law under rule 23(a)(3) The court denied the rehearing on January 31, 1941. It is sought by this petition to obtain a review so that the other plaintiffs be not compelled to file separate actions and to enable them to litigate their claims in the same suit with Eunice E. Eastman who is entitled to maintain the suit under the reversal of the District Court.

Questions Presented.

1. If it be true, as held by the court, that this was a class suit in the "spurious" sense was it improper to join the noteholders whose separate notes lacked the jurisdictional amount with the plaintiff Eunice E. Eastman, who had the required jurisdictional amount under the decision in the instant case, pursuant to Rule 23 (a)(3), and what is the effect of this rule on the right to such joinder.

2. Whether a suit by several noteholders of a $30,000,000 note issue secured by the same Trust Indenture may be maintained as a class suit under Rule 23(a)(1) in an action against the Trustee of the note issue for malfeasance and misfeasance, where common relief was sought for all noteholders.

3. Whether a complaint which alleges that the plaintiffs were defrauded by a common fraud may be defeated by a motion to dismiss which did not challenge the sufficiency of the allegations but merely challenged the jurisdiction of the court as to the required amount.

4. May a reviewing court in reversing a dismissal on the ground of lack of jurisdiction in the jurisdictional amount, exclude one of the plaintiffs who claimed a debt of $6,000 on the theory that upon the merits of the case such claim may be adjudicated to be only $3,000, and was it proper for such court to consider the merits in determining the jurisdictional issue.

Reasons for the Allowance of the Writ.

1. The decision in the instant case that in a class suit under Rule 23(a)(3), claimants whose claims are less than the jurisdictional amount may not be joined with a plaintiff who has the jurisdictional amount, is in conflict with the decision of the Seventh Circuit in *Railway Express Agency* v. *Jones,* 106 F. 341, and with the decision in the Third Circuit in *Independence Shares Corp.* v. *Deckert,* 108 F. (2) 51, which was affirmed on this point by this court on a writ of certiorari. (85 Law Ed. p. 171.)

2. The decision that there can be no class suit for a common fraud by holders of notes issued under one Trust Indenture and that the holders of such notes may not unite with a holder who has the required jurisdictional amount in matters involving a common state of facts and points of law is in direct conflict with the decision of the Seventh Circuit and with the decision of this court cited above and is also in conflict with the decision in *Finance Corporation* v. *Keystone Credit Corporation,* 50 F. (2) 872 (C. C. A. 4).

3. The conflict in some of the decisions on the right

to join persons who lack the jurisdictional amount with persons having the jurisdictional amount and the effect of Rule 23(a)(3) to harmonize these decisions warrants the issuance of the writ in the instant case.

Prayer for Relief.

Wherefore, the petitioners herein pray the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to the end that the cause herein may be reviewed and decided by this court and that in so far as its order affirmed that part of the order of the District Court in dismissing the complaint as to some of the petitioners and reversing it only as to the petitioner Eunice E. Eastman be reversed.

ELIAS HACKNER, *et al.*,
Petitioners,

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